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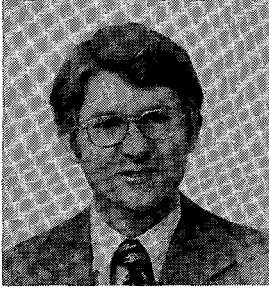


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The Retroactive Application of the Antidumping Act of 1921

Thomas E. Johnson*

In 1921, the United States Congress enacted the Antidumping Act which provides for the imposition of dumping duties on imports sold to United States merchants at prices below their fair value. The Act permits the assessment of dumping duties retroactively on merchandise imported up to one hundred and twenty days before a complaint of dumping has been filed with the Commissioner of Customs. Mr. Johnson examines the retroactive provisions of the Act and its regulations, the case law surrounding those provisions, and the constitutionality of the provisions. Against this background, he concludes that the retroactive application of the Act, particularly with regard to the period prior to the withholding of appraisement, is not only unfair to importers and inconsistent with U.S. free trade policy, but also in violation of the due process and equal protection clauses of the U.S. Constitution.

Not until the last ten years has the Antidumping Act of 1921¹ been so thoroughly studied, applied, and criticized by any legal practitioner other than the customs specialist. Today the general corporate practitioner has found the application of provisions in the Act to be invaluable in accomplishing the goals of corporate clients who seek more sophisticated means to deter foreign competition. Complaints by American businessmen of violations under the Act tend to increase as American productivity drops, United States sensitivity to domestic profit margins increases, and the portion of the United States market controlled by foreign producers grows.² Because the Act permits a finding of dumping under a wide range of divergent facts and circumstances,³ enforcement of the Act is susceptible to political and eco-

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¹ 19 U.S.C. §§ 160-173 (1976).

² "Customs in 1975 was investigating, administering, and monitoring approximately 75 cases. By July of this year (1978), the case load was up to 129 cases, a 72 percent increase." United States-Japan Trade Council, Council Report No. 44 (October 3, 1978) [hereinafter cited as Council Report No. 44]. See also note 10 *infra*.

³ See, e.g., 19 C.F.R. § 153.9 (1978) which provides that "reasonable allowances will be made

conomic influences not common to other laws. The sometimes haphazard enforcement of the Act has led U.S. trading partners to charge that the Act constitutes a substantial non-tariff barrier to trade with the United States.⁴

The difficulties inherent in the interpretation and enforcement of the Act have been addressed by numerous commentators.⁵ While some improvements have been made, one area that remains in distress is the retroactive application of the Act. Within our own country, retroactivity is offensive to basic notions of fair play and due process as guaranteed by the United States Constitution.⁶ Outside of the United States, the application of the Act in a retroactive manner continually draws criticism from the world trading community.⁷ As United States courts have held on numerous occasions that dumping duties are remedial

for the differences in quantities [of sale], including such differences in individual sales, *if it is established to the satisfaction of the Secretary* [of the Treasury] that the amount of any price differential is wholly or partly due to such differences.” (Emphasis added). *See also* 19 C.F.R. § 153.10 (1978)(discretionary allowances for credit terms, guarantees, warranties, technical assistance, servicing, assumption by a seller of a purchaser’s advertising or other selling costs, and commissions); *id.* § 153.11 (allowances for differences in merchandise); *id.* § 153.15 (allowances for differences in level of trade); *id.* § 153.16 (determination of fair value for sales at varying prices).

⁴ *See, e.g.*, FIRST REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, 8th Supp., BIRD 145, ¶¶ 19, 23 (1960); SECOND REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, 9th Supp. BIRD 194, ¶ 9 (1961); FOURTH REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, 19th Supp. BIRD 15, ¶ 11 (1972); FIFTH REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, 20th Supp. BIRD 43 ¶¶ 10, 13 (1973); SIXTH REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, 21st Supp. BIRD 30, ¶¶ 8, 10 (1974); SEVENTH REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, 22d Supp. BIRD 21, ¶ 11 (1975) [the reports will be hereinafter collectively cited as REPORTS BY THE COMMITTEE ON ANTIDUMPING PRACTICES]; R. BALDWIN, NON-TARIFF DISTORTIONS OF INTERNATIONAL TRADE, 139-40 (1970); CANADIAN ELECTRICAL MANUFACTURERS ASSOCIATION, NON-TARIFF BARRIERS TO TRADE AND COMPETITIVE DISADVANTAGES IN FOREIGN MARKETS (1967).

⁵ *E.g.*, Note, *Treasury Runs the Maze: Less Than Fair Value Determinations Under the Antidumping Act of 1921*, 8 GA. J. INT’L & COMP. L. 919 (1978); Note, *Innovation and Confusion in Recent Determinations of the Tariff Commission Under the Antidumping Act*, 5 N.Y.U. J. INT’L L. & POL. 212 (1971); Note, *Antidumping Act: Problems of Administration and Proposals for Change*, 17 STAN. L. REV. 730 (1965); T. Myerson, *Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT’L L. 167 (1976); Note, *Customs Duties—Antidumping Act of 1921—The Secretary of the Treasury has No Authority to Terminate a Withholding of Appraisal Prior to the Publication of a Dumping Finding Based on a Likelihood of Injury Determination by the International Trade Commission*, 10 VAND. J. TRANSNAT’L L. 153 (1977); W. Schwartz, *Administration of the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping Duties*, 14 VA. J. INT’L L. 463 (1974); NOTE, *Unfair Competition—Antidumping Act Protects Domestic Portion of a Multi-National Corporation from Unfair Competition by Foreign Branch of Same Corporation*, 6 TEX. INT’L L. F. 361 (1971); J. Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491 (1972); R. Prosterman, *Withholding of Appraisal Under the United States Antidumping Act: Protectionism or Unfair Competition Law?*, 41 WASH. L. REV. 315 (1966).

⁶ U.S. CONST. amends. V, XIV.

⁷ *See* REPORTS BY THE COMMITTEE ON ANTIDUMPING PRACTICES, *supra* note 10.

and not punitive,⁸ it is anomalous in the extreme for the United States to apply such duties retroactively. A plenary analysis of the U.S. law and practice in this regard is warranted.

THE RETROACTIVE PROVISION AND ITS APPLICATION

The Act provides in Section 202(a):⁹

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding [of dumping] as provided for in Section 160 of this Title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised or presented to the Secretary or to any person to whom authority under said section has been delegated, and as to which no appraisalment has been made before such finding has been made public, if the purchase price or exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

This section permits the assessment of dumping duties retroactively on merchandise imported up to one hundred and twenty days before a complaint of dumping is filed with the Commissioner of Customs. Arguably, of course, an importer should not be required to pay dumping duties on *any* imports before the date of an actual finding of dumping. To do so is to assume the conclusion, *i.e.*, that the defendant-importer is guilty until proven innocent. Statistically, the number of dumping findings actually made compared with the number of complaints filed is so small that the probability that a dumping finding will ever be made is very insubstantial.¹⁰ Nevertheless, the fairness of the assessment of dumping duties on importations prior to the date of the dumping finding is related to the period during which they are imported.

There are three distinct time periods encompassed by the retroactive application of the Act:

⁸ C.J. Tower & Sons v. United States, 71 F.2d 438, 446 (C.C.P.A. 1934); Imbert Imports, Inc. v. United States, 331 F. Supp. 1400 (Cust. Ct. 1971). Cf. Amtorg Trading Corp. v. United States, 71 F.2d 524, 531 (C.C.P.A. 1934) (discussing the Antidumping Act and citing the holding of *C.J. Tower & Sons* with approval).

⁹ 19 U.S.C. § 161 (1976).

¹⁰ Between 1955 and September 1978, only thirteen percent of the antidumping investigations initiated resulted in a finding of dumping. Interview with Director of the Planning Branch, Duty Assessment Division, United States Customs Service [hereinafter cited as Director's Interview]. Most of the investigations were terminated by determinations that there had been no sales at less than fair value or that there had been no injury. *Id.* Another sixteen percent were terminated by price revisions and assurances upon the part of the foreign producer resulting in a discontinuance of the antidumping investigation. *Id.* A year-by-year tabulation follows:

- (1) the period prior to the filing of the complaint;
- (2) the period between the filing of the complaint and the withholding of appraisement; and
- (3) the period between the withholding of appraisement and the finding of dumping.

Before discussing the propriety of the assessment of dumping duties in each of these time periods, it is helpful to briefly review the procedural course of a dumping investigation.

PROCEDURAL COURSE OF A DUMPING INVESTIGATION

The Act and the Regulations thereunder provide that a complaint of dumping may be initiated by a Customs officer or by any person outside of the Customs Service.¹¹ Upon receipt of such a complaint, the Commissioner of Customs conducts a "preliminary investiga-

| | | Year | No. Dumping Cases Initiated | Findings of Dumping | Discontinuances |
|-------|--------|------|--------------------------------|------------------------|-----------------|
| | | 1955 | 51 | 1 | 5 |
| | | 1956 | 22 | 0 | 1 |
| high | (Aug.) | 1957 | 27 | 0 | 4 |
| low | (Apr.) | 1958 | 27 | 0 | 5 |
| | | 1959 | 37 | 0 | 13 |
| high | (Apr.) | 1960 | 29 | 1 | 7 |
| low | (Feb.) | 1961 | 38 | 3 | 5 |
| | | 1962 | 23 | 0 | 12 |
| | | 1963 | 30 | 1 | 4 |
| | | 1964 | 37 | 3 | 12 |
| | | 1965 | 12 | 2 | 0 |
| | | 1966 | 15 | 2 | 0 |
| | | 1967 | 16 | 6 | 0 |
| | | 1968 | 17 | 5 | 0 |
| high | (Dec.) | 1969 | 21 | 9 | 2 |
| low | (Nov.) | 1970 | 17 | 9 | 2 |
| | | 1971 | 34 | 9 | 8 |
| | | 1972 | 32 | 11 | 4 |
| high | (Nov.) | 1973 | 21 | 3 | 6 |
| | | 1974 | 11 | 2 | 0 |
| low | (Mar.) | 1975 | 23 | 3 | 9 |
| | | 1976 | 13 | 4 | 1 |
| | | 1977 | 37 | 7 | 1 |
| | | 9/78 | 28 | 0 | 0 |
| Total | | | 618 | 81 | 101 |

To the left of the "Year" column, the "highs" and "lows" of the leading economic indicators of the domestic business cycle are noted. *See* U.S. DEPT. OF COMMERCE, BUSINESS CONDITIONS DIGEST 11 (Oct. 1977). It appears that dumping complaints peak about one or two years after the business cycle hits its "low." *Id.*

¹¹ 19 C.F.R. §§ 153.25-153.26 (1977).

tion.”¹² If the Commissioner determines that the information is erroneous, or that merchandise of the class or kind is not being and is not likely to be imported in more than insignificant quantities, or for other reasons determines that further investigation is not warranted, he shall so advise the person who submitted the information and the case shall be closed.¹³

If the case is not closed, however, the Secretary will publish an “Antidumping Proceeding Notice” in the *Federal Register*.¹⁴ Thereupon, the Commissioner will proceed with a “full-scale” investigation.¹⁵ The Commissioner “will, where appropriate,” conduct an investigation of the foreign market value and “ordinarily” will require the foreign manufacturer, producer, or exporter to submit pricing information.¹⁶ In addition, the Commissioner may entertain comments by “interested persons.”¹⁷ If an adequate investigation is not permitted by, or if any information deemed necessary is withheld by, the foreign manufacturer or exporter, the Secretary will make a decision based upon the information available to him.¹⁸

At the conclusion of this investigation, if the Secretary determines that there is reason to believe or suspect that the purchase price is less, or that the exporter’s sales price is less, or is likely to be less than the fair value of such or similar merchandise, and if there is evidence on record concerning injury or likelihood of injury to or prevention of establishment of an industry in the United States, he must publish a “Withholding of Appraisement Notice” in the *Federal Register* and an affirmative “Determination of Sales at Less Than Fair Value.”¹⁹ Upon publication of the “Withholding of Appraisement Notice,” the District Director of Customs at each of the ports must withhold appraisement “as to merchandise entered, or withdrawn from warehouse, for consumption, on or after the date of publication of the ‘Withholding of Appraisement Notice,’ unless the Secretary’s ‘Withholding of Appraisement Notice’ specifies a different effective date” and “shall notify the importer, consignee or agent immediately of each lot of merchandise with respect to which appraisement is so withheld.”²⁰ The notice must indicate (1) the rate of duty of the merchandise under the applicable item of the Tariff Schedules of the United

¹² *Id.* § 153.29.

¹³ *Id.* § 153.29.

¹⁴ *Id.* § 153.30.

¹⁵ *Id.* § 153.31.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* §§ 153.35-153.36.

²⁰ *Id.* § 153.48.

States if known, and (2) the estimated margin of the special dumping duty that could be assessed.²¹

After the publication of the "Withholding of Appraisement Notice," interested persons may make written submissions to the Commissioner of Customs and request the opportunity for an oral presentation of their views.²² When the Secretary makes the "Determination of Sales at Less Than Fair Value" the matter is referred to the United States International Trade Commission (ITC) for a determination of injury.²³ Any interested party may submit a written statement of information pertinent to the subject matter of any injury investigation.²⁴ Public hearings may also be held at which interested parties may appear and present their views.²⁵ If the ITC determines that "an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States," the determination is published in the *Federal Register*, and the Secretary of the Treasury is notified of the decision.²⁶ The Secretary of the Treasury accordingly enters a finding of dumping which is published in the *Federal Register*.²⁷ Thereafter, upon completion of of the appraisement process and the liquidation of the entries, the district directors at the ports must notify the importer, consignee, or agent of the increase in duties and will require the importer to file a statement certifying whether or not he will be reimbursed by the exporter, manufacturer, producer, or seller for the dumping duties which will be assessed.²⁸

THE PERIOD BETWEEN THE WITHHOLDING OF APPRAISEMENT AND THE FINDING OF DUMPING

The rationale for imposing dumping duties prior to the actual finding of dumping is strongest during the period between the withholding of appraisement and the finding of dumping. After the Secretary of the Treasury publishes the "Withholding of Appraisement Notice," the importer is on notice that the Secretary has determined that there are reasonable grounds to suspect sales of imported merchandise at less than fair value and that evidence exists of injury or

²¹ *Id.*

²² *Id.* § 153.40.

²³ *Id.* §§ 153.41, 208.3.

²⁴ *Id.* §§ 208.3, 208.5.

²⁵ *Id.* § 208.4.

²⁶ *Id.* §§ 208.2, 208.6.

²⁷ *Id.* §§ 153.43, 153.45.

²⁸ *Id.* §§ 153.55, 153.49.

likelihood of injury to, or of prevention of, the establishment of an industry of the United States. Although at this point the plenary injury determination has not yet been made by the ITC, the importer has been made aware of his potential liability and of the estimated dumping margins. With this knowledge, he is capable of making the business decision of whether to continue to import the merchandise, to negotiate price revisions, or to discontinue importation of the merchandise. If he chooses to continue importing at that price, he does so at his own risk. In the event that a dumping finding is actually made, "retroactive" assessments on importations made after the notification to the importer are, therefore, not without justification.²⁹

THE PERIOD BETWEEN THE FILING OF THE COMPLAINT AND THE WITHHOLDING OF APPRAISEMENT

The justification for retroactive imposition of dumping duties diminishes as to merchandise imported *before* the Secretary publishes a "Withholding of Appraisement Notice."³⁰ Although a preliminary and perhaps full-scale investigation will be underway, there is no reason to assume at this point that the Customs Service will reach an affirmative conclusion. Indeed, the ease with which disgruntled competitors may file a colorable dumping complaint, the rights of the importer and exporter to oppose it, the uncertainty of the results of the foreign value investigation, and the high statistical probability in favor of a negative finding all dictate that it would be an unjustifiable restriction upon the importer to require him to suspend his importations during this period. Even after the complaint has been filed, it may be some time before the

²⁹ THE FIRST REPORT OF THE GROUP OF EXPERTS, note 4 *supra*, at ¶¶ 19, 23. The Report recognized that, under the International Antidumping Code, antidumping duties could be levied against merchandise subject to "provisional measures." *Id.* However, it stressed that "it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits . . ." *Id.* Further, it stressed that "provisional measures should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character." *Id.* However, even the conclusion in the text is not accurate where, as in the television antidumping case, the Treasury Department departs from its usual method of appraisement *after* the merchandise is already imported. Some televisions manufactured by Sony Corporation, Mitsubishi Electric Corporation, and Sharp Corporation which had previously been free of dumping duties became theoretically subject to duties by the application of the commodity tax formula method of estimating foreign market value. See Council Report No. 44, *supra* note 2. Electronic Industries Assn. of Japan, *An Open Letter to the U.S. Congress on Dumping and the Cost of T.V. Sets*, N.Y. Times, Feb. 6, 1979, § A, at 10-11.

³⁰ As to merchandise imported before the dumping complaint is filed, the justification for the application of retroactive dumping duties is even less tenable. See notes 34-45 and accompanying text *infra*.

importer becomes aware of the dumping investigation.³¹ Moreover, even if the importer believes the complaint is legitimate, a further period of time may pass before he can arrange his business affairs to stop shipments or negotiate price revisions.

Nevertheless, under present law and practice the importer may be liable for duties assessed retroactively on importations within this period.³² The only rationale which could justify these assessments would be the Commissioner's decision to conduct a full-scale investigation based upon the results of the preliminary inquiry; however, the standards which must be met before a full-scale investigation may proceed are so minimal that no importer should be required to curtail his imports based upon a mere decision by the Commissioner to undertake such an investigation.³³

THE PERIOD PRIOR TO THE FILING OF THE COMPLAINT

During the period after the complaint has been filed, it may be argued that the fact that someone has complained about dumping may have come to the importer's attention, and therefore, he should have discontinued his importations. No such argument can be made as to importations made prior to the filing of the complaint. However, under present law and practice, importations made up to 120 days prior to the filing of the complaint which remain unappraised for any reason on the date of the dumping finding are subject to the duty.³⁴

Several reasons have been advanced to justify the retroactive imposition of dumping duties. It has been argued that the retroactive imposition of these duties "may act as a warning that will deter future dumping."³⁵ Assuming that a particular exporter is contacted by a U.S. Customs representative requesting foreign market value information, this reasoning applies with some force after that contact and with even more force after the withholding of appraisement. It cannot apply prior to that time, for neither the exporter nor the importer would have

³¹ The Act and Regulations do not provide for personal notice to the importer—the person liable for the duties—upon the filing of the dumping complaint. Requests for information on the foreign market value are directed to the exporter, and not until an affirmative determination is reached and a "Withholding of Appraisement Notice" issued, do the Regulations provide for personal notice of the investigation to the importer. 19 C.F.R. § 153.48 (1977).

³² See note 9 and accompanying text *supra*.

³³ Indeed, according to the U.S. Customs Service, only where the complaint is "not in proper form" would the full-scale investigation not proceed. Interview with Operation Officers, Duty Assessment Division, United States Customs Service.

³⁴ See note 9 and accompanying text *supra*.

³⁵ Conner & Buschlinger, *The United States Antidumping Act: A Timely Survey*, 7 V.A. J. INT'L L. 117, 131-32 (1966).

received notice of the potential dumping complaint. Therefore, the eventual imposition of dumping duties during this period would have come too late to "deter" any conduct on the part of either. Indeed, since the importer is liable for the duty, the exporter would never be deterred at all.³⁶

Another argument runs: "since duties will not be imposed unless dumped imports have already caused injury or threatened injury, further injury will surely result if dumped, but as yet unappraised, imports are allowed to enter without paying dumping duties."³⁷ Proponents of this argument fail to realize that the importer, the party upon which the duty is imposed, can take no action until after the filing of the complaint to curb his imports. The underlying rationale for this argument appears to be based more on heaping penal duties upon the importer rather than on stopping the flow of the offending merchandise.³⁸

Finally, commentators have also argued that retroactivity is needed to prevent "hit-and-run" or "spot" dumping from escaping dumping duties.³⁹ Aside from the conclusion which most economists have drawn that "spot" dumping causes no injury to domestic industry and actually results in a net economic benefit to the consumer,⁴⁰ there is little objective evidence to indicate that foreign producers can sufficiently control their production in relation to their domestic demand and negotiate sales with U.S. buyers with sufficient alacrity to "spot" dump their excess production in U.S. markets.⁴¹ Assuming that it was possible, one question which would still remain is whether the Act should err on the side of the imposition of duties on a single U.S. importer or on the side of an occasional loss of sales absorbed by the entire U.S. industry.

The unarticulated justification for retroactivity appears to rest on the assumption that the importer should know at the time he purchases a foreign product that the price he has paid is a dumping price. Simi-

³⁶ This last argument fails, of course, if the exporter has agreed to reimburse the importer for any dumping duties. Such agreements are not permitted on entries made *after* the date of withholding of appraisement. 19 C.F.R. § 153.49 (1977). See note 28 and accompanying text *supra*.

³⁷ Conner & Buschlinger, *supra* note 35, at 131.

³⁸ It is also incorrect to assume that the American importer merely "passes on" the increased duty to his customers. Aside from the fact that the importer may have stopped importing the merchandise long before the dumping finding is entered, the American importer's ability to pass along the duties is limited by the elasticity of demand for the merchandise and the terms of the contract with his buyer.

³⁹ Conner & Buschlinger, *supra* note 35, at 132.

⁴⁰ McFadyean, INTERNATIONAL TRADE: COOPERATIVE OR COMPETITIVE 44-52 (C. Peters ed. 1946); J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 245 (1966).

⁴¹ *Id.*

larly, related exporters and importers are presumed to know that the price demanded by the foreign exporter is a dumping price.⁴² These are unrealistic assumptions. Most importers are small and unsophisticated.⁴³ They are incapable of forecasting the allowances which the U.S. Customs Service could eventually grant for the differences in circumstances of sale. In addition, the ordinary importer does not have the economic leverage necessary to extract a "dumping" price and lacks the ability to verify the price in the foreign market. Moreover, the importer should be able to rely on the sworn declarations of foreign market value and non-dumping contained in the Special Customs Invoice signed by the exporter.⁴⁴ In return, the exporter should be able to rely on the need to make these declarations to prevent an economically powerful buyer from seeking a "dumping" price.

As the Act is now enforced, the United States imposes dumping duties on U.S. importers even though the foreign seller is often the only party which can ascertain the foreign market value. The only logical rationale appears to be the inability of the United States to obtain jurisdiction over the foreign sellers.⁴⁵ As a result, the Act, as applied, presumes a conspiracy on the part of the exporter and importer or presumes bad faith in price bargaining on the part of the importer.

⁴² See Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189, 198 (1965).

⁴³ According to data compiled by the U.S. Customs Service, in fiscal year 1975 there were 116,234 importers of record in the United States. Director's Interview, note 10 *supra*. Of these, 84,783 or 73% were "one-time shippers," *i.e.*, they entered only one shipment of goods during the year. *Id.* Another 27,009 importers or 23% entered between 2 and 99 entries that year. *Id.* Another 2,900 importers entered between 100 and 249 entries that year. *Id.* Another 990 importers entered between 250 and 499 entries that year. *Id.* Another 387 importers entered between 500 and 999 entries that year. *Id.* And, 174 importers made over 1,000 entries during the year. *Id.* Additionally, this data shows that 83% of all importations made were under \$10,000 in value. *Id.*

⁴⁴ United States Customs Form 5515, §§ IV, V, Question 9 (1978). An interesting but unlitigated question exists as to whether litigation to collect damages by the importer against the exporter for breach of this "warranty" would be a reimbursement of dumping duties under the Customs Regulations. *Cf.* 19 C.F.R. § 153.49 (1978) (a refund of dumping duties by the exporter to the importer will only result in an increase in the dumping duties assessed in the amount of the refund unless the refund relates to merchandise purchased before the withholding of appraisement and exported before a determination of sales at less than fair value is made.)

⁴⁵ *Hearing On the International Antidumping Code Before the Senate Comm. on Finance*, 90th Cong., 2d Sess. 1 (1968) (statement of Senator Russell B. Long). Senator Long stated:

The Antidumping Act is one feature of a body of unfair trade laws that this Nation has provided to prevent foreign merchandise and foreign merchants from victimizing American industry. It is designed to protect against the rankest kind of commercial injustice—price discrimination by foreign competitors who are immune to prosecution under the laws of this country. The Antidumping Act operates directly against the offending goods as they come into this country, since we are unable to act against the offender himself.

Id.

THE GATT INTERNATIONAL ANTIDUMPING CODE AND NATIONAL
LEGISLATION

In 1947, the United States became a contracting party to the General Agreement on Tariffs and Trade (GATT).⁴⁶ The purpose of the Agreement was to reduce the number of tariffs and other trade barriers which impeded free trade among the contracting nations.⁴⁷ Eventually, the contracting parties were able to agree that a substantial non-tariff trade barrier was the discriminatory and politically motivated administration of national dumping legislation. Their agreement to eliminate this barrier became Article VI of GATT, also known as the *International Antidumping Code* (the Code).⁴⁸

While the Code dealt with the substantive and procedural aspects of dumping, Article II specifically dealt with retroactivity.⁴⁹ Briefly, this Article provides that antidumping duties shall only be imposed on merchandise entered after the date of the dumping finding unless:

- (1) provisional measures have been applied, *e.g.*, withholding of appraisement, in which case duties may be assessed for the pe-

⁴⁶ Oct. 30, 1947, 61 Stat. 1103, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

⁴⁷ *Id.*

⁴⁸ [1968] 19 U.S.T. 4348, T.I.A.S. No. 6431 [hereinafter cited as Code].

⁴⁹ Article II reads:

Retroactivity

Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

- (i) Where a determination of material (injury but not of a threat of material injury, or a material retardation of the establishment of an industry) is made or where the provisional measures consist of provisional duties and the dumped imports carried out during the absence of these provisional measures, have caused material injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

- (ii) Where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of anti-dumping duties may extend back to a period not more than 120 days before the submission of the complaint.
- (iii) Where for the dumped product in question the authorities determine
 - (a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and
 - (b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude its recurring, it appears necessary to assess an anti-dumping duty retroactively on those import.

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures. *Id.*

riod of application of the provisional measure;⁵⁰

- (2) appraisement is suspended for reasons which are unrelated to dumping and which arose before the dumping complaint was filed, in which case duties may be assessed for a period of up to 120 days before the filing of the complaint;⁵¹ or
- (3) the exporter has a history of sporadic dumping which has caused material injury, or the importer should have been aware that the exporter was sporadically dumping and causing material injury.⁵² Under these circumstances, duties may be assessed for a period of up to 90 days before the application of provisional measures.⁵³

Subsequent history indicates that the other contracting parties to the Code were opposed to all forms of retroactivity and were particularly critical of the long period of time required to complete a dumping investigation in the United States.⁵⁴ In exacerbation of the lengthy investigations, the United States commonly imposed withholding of appraisement during this period of time,⁵⁵ which effectively destroyed imports of the articles under investigation and increased retroactivity. This was unjustifiable in light of the small number of investigations which eventually resulted in a finding of dumping.⁵⁶ The contracting parties resolved the issue in part by including a provision in the Code which permits the imposition of dumping duties on goods subject to provisional measures.⁵⁷ In return, the United States agreed to provisions⁵⁸ which (1) require some evidence of injury before the application of provisional measures, and (2) place a time limit upon the length of investigations. The United States successfully insisted upon retaining its practice of 120 days of pre-complaint retroactivity on unappraised entries for no apparent reason other than the Treasury Department's own backlog and inefficiency.⁵⁹ In addition, the parties agreed to permit retroactivity for 90 days prior to the imposition of provisional

⁵⁰ Art. 11, ¶ (i).

⁵¹ *Id.* ¶ (ii).

⁵² *Id.* ¶ (iii).

⁵³ *Id.*

⁵⁴ See REPORTS BY THE COMMITTEE ON ANTIDUMPING PRACTICES, note 4 *supra*; U.S. Tariff Commission, Report of the U.S. Tariff Commission to the Senate Committee on Finance on S. Con. Res. 38, 90th Congress, A Concurrent Resolution Regarding the International Antidumping Code signed at Geneva on June 30, 1967, (1968), reprinted in *Hearings on S. Con. Res. 38 Before the Senate Committee on Finance*, 90th Cong., 2d Sess. 351 (June 27, 1968).

⁵⁵ FOURTH REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, note 4 *supra*, FIFTH REPORT BY THE COMMITTEE ON ANTIDUMPING PRACTICES, note 4 *supra*.

⁵⁶ See note 10 *supra*.

⁵⁷ Code, *supra* note 48, at arts. 10, 11.

⁵⁸ See 19 C.F.R. §§ 153.29, 153.30(b), 153.32, 153.35, 208.6 (1978).

⁵⁹ Code, *supra* note 48, at art. 11, ¶ (ii).

measures where the importer knew or should have known that the exporter was a recidivist.⁶⁰

The fact that the other contracting parties were never satisfied with this compromise is revealed in the minutes of the Committee on Antidumping Practices, which meets annually to discuss current issues.⁶¹ Attacks have repeatedly been made upon the U.S. for retroactive application of duties and other violations of the Code.⁶²

The other contracting parties soon implemented the Code in their national legislation and complied with its requirements. With the exception of Japan, whose legislation was modeled on U.S. law, the author has been unable to find a single example of national legislation, either before or after the enactment of the Code, permitting any retroactivity prior to the application of provisional measures.⁶³ The U.S. response to the Code, however, was the Renegotiations Amendments Act of 1968,⁶⁴ which stated that, in the event of conflict between the Code and the Act, the Act would supersede the Code, *viz.*, the U.S. would continue its former practice with regard to retroactivity in any event. All of this might be justified if the United States could advance cogent arguments for maintaining its position. Unfortunately, it has continued to indicate in substance that it is not very important anyway.⁶⁵

JUDICIAL INTERPRETATION OF THE RETROACTIVE PROVISION

The earliest version of the Antidumping Act⁶⁶ did not specifically address the issue of retroactivity. The Act merely provided that the Customs officer could unilaterally withhold appraisement where he suspected dumping.⁶⁷ Dumping duties were imposed on unappraised merchandise as of the date of the dumping finding.⁶⁸ Retroactivity was involved in the appraisement process, since prior to the withholding of

⁶⁰ *Id.* ¶ (iii)(a).

⁶¹ See REPORTS BY THE COMMITTEE ON ANTIDUMPING PRACTICES, note 4 *supra*.

⁶² *Id.*

⁶³ See generally K. JUNCKERSTORFF, ANTIDUMPING RECHT (1974). See also GATT, ANTIDUMPING LEGISLATION (1970).

⁶⁴ Pub. L. 90-634, Title II, § 201, 82 Stat. 1347 (1968).

⁶⁵ "U.S. law permits the retroactive assessment of duties 120 days before the complaint. The discrepancy exists but is unimportant in practice: The retroactive provision is seldom used." UNITED STATES CUSTOMS SERVICE, U.S. ANTIDUMPING PROCEDURES No. 13-72 (Oct. 19, 1972). Obviously, this is completely unconsoling to those importers who are assessed duties.

⁶⁶ Pub. L. No. 67-10, 42 Stat. 11 (1921) (current version at 19 U.S.C. §§ 160-173 (1976)).

⁶⁷ *Id.* § 201(b) (current version at 19 U.S.C. § 160(b) (1976)).

⁶⁸ *Id.*

appraisement most entries were not liquidated.⁶⁹

However, one of the first challenges to be made by an importer to the retroactive application of the Act was raised in *Kleberg & Co. v. United States*.⁷⁰ The importer in *Kleberg* had argued that any retroactivity prior to the actual finding of dumping was contrary to the Act. The court rejected the contention, stating:

It is argued that the Secretary's order could not be retroactive and be made to apply to goods entered several months before the order was issued. However, papers disclose that the appraisement was held in abeyance by the local appraiser upon this entry until after the Secretary's order was promulgated, in accordance with the provision of said Section 201(b), 19 U.S.C.A. § 160(b). The goods were imported subject to the provisions of said Act, and the importer's rights must be measured thereby.⁷¹

Kleberg may be read to stand for two propositions: (1) the imposition of dumping duties on goods entered prior to the dumping finding is not *per se* contrary to the Act; and (2) goods which have not been appraised *in accordance with Section 201(b) of the Act* may be subjected to dumping duties. The case did *not* decide the validity of the imposition of dumping duties upon unappraised goods where the appraisement is withheld for reasons other than those listed in Section 201(b) of the Act.⁷²

The court in *Kleberg* attempted to justify its decision by explaining that "the goods were imported subject to the provisions of said Act."⁷³ This in effect requires an importer to accept any assessment or imposition by the Customs Service even though a reading of the statute would not have reasonably led him to suspect that such a result would occur. In short, the court imposed the then accepted strict liability standard of business tort causation rather than the now widely accepted reasonably foreseeable consequences standard.⁷⁴

In the second case dealing with the issue of retroactivity, the court in *Kreutz v. Durning*⁷⁵ stated:

Finally, we can see no grievance in the supposed retroactive feature of the act. It is quite true that an importer brings goods into the United States at

⁶⁹ Director's Interview, note 10 *supra*. Most entries were liquidated within one year. *Id.*

⁷⁰ 71 F.2d 332 (C.C.P.A. 1933).

⁷¹ *Id.* at 335.

⁷² Appraisement was withheld in *Kleberg* because the appraising officer suspected dumping. 71 F.2d at 334. The court did not imply that the same rationale would apply where the appraisement was withheld for reasons unrelated to suspected dumping, *e.g.*, a value investigation or administrative backlog. *Id. Accord*, Section 201(b).

⁷³ 71 F.2d at 335.

⁷⁴ See generally W. PROSSER, LAW OF TORTS §§ 41-44 (4th ed. 1971).

⁷⁵ 69 F.2d 802 (2d Cir. 1934).

his peril, that it may be found that he has been "dumping"; and that the decision will follow the importation. All decisions in that sense are retroactive; but the constitutive factors on which the duty is reckoned are expressly referred to the time of exportation. That the importer may not know whether the Secretary will discover them, or choose to act upon them is nothing; he obviously takes his chances.⁷⁶

The court's distrust of the importer and its open hostility to the importation of foreign goods is clearly evident in the language of the decision.⁷⁷ Retroactivity should only be applied where the importer is adequately apprised of the legal consequences which may flow from a contemplated course of action.⁷⁸ The mere fact that the importer has purchased the goods prior to the date of importation has no bearing on the issue of whether he can reasonably be assumed to have had knowledge (1) of the foreign market value on the date of purchase or exportation; (2) that the representations of the seller-exporter sworn to in the Special Customs Invoice as to foreign market value and non-dumping are false; and (3) that somewhere a disgruntled competitor might file a dumping complaint which will lead to the imposition of duties on goods purchased and imported months before, if they remain unappraised for any reason on the date of the dumping finding.

With the exponential expansion of trade in the post-World War II era, the Customs Service soon had a backlog of entries which remained unappraised for varying reasons.⁷⁹ As a result, when a dumping finding was eventually entered, Customs had many unappraised entries to which duties applied even though they may have been imported long before the filing of the dumping complaint. Under the Customs Simplification Act of 1954,⁸⁰ it was proposed that this retroactivity be eliminated.⁸¹ Instead, the present Section 202(a),⁸² which limits the retroactivity to 120 days, was enacted. There is nothing in the legislative history of the Act to explain why the 120-day period was chosen or even why any retroactivity was necessary.⁸³ Subsequently, however, John D. Rode, then-vice president of the Association of the Customs Bar, during hearings on the Act observed that "there is nothing sacro-

⁷⁶ *Id.* at 804.

⁷⁷ *Id.*

⁷⁸ See note 102, *infra*.

⁷⁹ H.R. REP. NO. 2453, 83d Cong. 2d Sess., 4, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 3900, 3904.

⁸⁰ Pub. L. No. 83-768, 68 Stat. 136 (1954).

⁸¹ H.R. REP. NO. 2453, *supra* note 78.

⁸² Customs Simplification Act of 1954, *supra* note 80 (current version at 19 U.S.C. § 161(a) (1976)).

⁸³ See H.R. REP. NO. 2453, *supra* note 79.

sanct about the period of 120 days.”⁸⁴ The Customs Service, however, has continued to rely upon this enactment as a Congressional stamp of approval for retroactivity.⁸⁵

At least one judge has expressed serious reservations about the validity of the conclusions of *Kreutz v. Durning*. In *Horton v. Humphrey*,⁸⁶ the court stated:

Plaintiffs urge two constitutional contentions. The first is that the effect of the Act is retroactive in that the dumping duty may be imposed on goods imported up to 120 days prior to the time the question of the dumping was first raised by or presented to the Secretary of Treasury, and in that the time when the question is first raised or presented to the Secretary of the Treasury may itself be substantially before the importer first hears of the proceeding or of the possibility of an additional duty being imposed. This, they say, deprives plaintiffs of their property without due process. . . . In the instant case the complaint asserts that the tax will be applied to importations starting on April 21, 1954, and that there was no notice to plaintiffs that would warn them of risks of liability for the duty until mid-summer 1955. Taking these allegations at face value the hardship is apparent The Government argues that the risk of liability for additional duties appears from the face of the Antidumping Act itself. This seems rather unrealistic in the light of the fact that importers must usually fix prices and sell their goods as promptly as they can and in the light of plaintiffs' contention that as a practical matter they cannot keep track of the price at which the imported items are being sold abroad. However, in *Kreutz v. Durning* . . . , the Second Circuit sustained the statute in spite of the retroactivity problems. And certainly any alleged retroactivity beyond the 120-day period could be raised in the Customs Court, as well as the question of the validity of any retroactivity during that statutory period.⁸⁷

The district court did not decide the constitutional issue, however, holding that it had no jurisdiction over the case since it belonged in the Customs Court.⁸⁸

*Timken Co. v. Simon*⁸⁹ is the most recent case dealing with the question of retroactivity. The court of appeals in *Timken* held that the Secretary of the Treasury does not have the discretion to eliminate dumping duties on entries imported after the date of the notice of withholding of appraisalment.⁹⁰ However, the court did not have to decide

⁸⁴ *Hearing on H.R. 6006, 6007, and 5120 Before the House Committee on Ways and Means*, 85th Cong., 1st Sess. 32, 225 (1957).

⁸⁵ Letter from Thaddeus Rojek, Chief Counsel, U.S. Customs Service, to the author (Aug. 24, 1978).

⁸⁶ 146 F. Supp. 819 (D.D.C. 1956), *aff'd per curiam*, 352 U.S. 921 (1956).

⁸⁷ *Id.* at 820.

⁸⁸ *Id.* at 821.

⁸⁹ 539 F.2d 221 (D.C. Cir. 1976).

⁹⁰ *Id.* at 231.

whether assessments on importations prior to the date of notice of withholding would be subject to assessment, as it appears there were none which were still unappraised on the date of the finding of dumping.⁹¹

After the decisions were rendered in *Kleberg* and *Kreutz*, Section 201 of the Act⁹² and its regulations⁹³ were amended. Customs officers are no longer permitted to withhold appraisal unilaterally.⁹⁴ They must await authorization by the Commissioner of Customs.⁹⁵

Section 201 of the Act as presently amended provides that appraisal will be withheld for merchandise entered after the date of publication of the "Withholding of Appraisal Notice" or "such earlier date, not more than one hundred and twenty days before the date [of the complaint], as the Secretary may prescribe [by regulation]."⁹⁶ The regulations issued pursuant to this Section now provide that the effective date of the withholding of appraisal shall be "the date of publication of the Withholding of Appraisal Notice unless the Secretary's [notice] specifies a different effective date."⁹⁷

Thus, in theory, the amended statutory and regulatory language appears to indicate that retroactivity will not normally be imposed earlier than the date of withholding of appraisal. In practice, however, the U.S. Customs Department has continued to assess dumping duties one hundred and twenty days before the filing of the complaint on any unappraised entries pursuant to its authority under Section 202(a).⁹⁸ This practice is followed even where the "Withholding of Appraisal Notice" does *not* provide for such retroactivity.⁹⁹ Furthermore, except for the recidivist regulations,¹⁰⁰ the Act provides no standards for the Secretary to follow in deciding whether to issue a "Withholding of Appraisal Notice" effective for an earlier date.

CONSTITUTIONAL OBJECTIONS TO RETROACTIVITY

The Act's retroactive provisions raise serious constitutional ques-

⁹¹ *Id.* at 223-25.

⁹² Pub. L. 93-618, Title III, § 321(a), 88 Stat. 2043 (1975) (amending 19 U.S.C. § 160 (1958)).

⁹³ 19 C.F.R. §§ 153.35(a), 153.39 (1978).

⁹⁴ 19 U.S.C. § 160(b) (1975); 19 C.F.R. §§ 153.35(a), 153.39 (1978).

⁹⁵ *Id.*

⁹⁶ 19 U.S.C. § 160(b)(1)(B) (1978).

⁹⁷ 19 C.F.R. § 153.48 (1978). *See also* 19 C.F.R. § 153.35(d) (providing for the retroactive withholding of appraisal in such circumstances as the Secretary deems appropriate, *e.g.*, where a dumping finding has been revoked and the Secretary finds that the situation reflects a history of sales below fair value.)

⁹⁸ Letter from Thaddeus Rojek, *supra* note 85.

⁹⁹ *Id.*

¹⁰⁰ 19 C.F.R. § 153.35(d) (1977).

tions. As the Act is presently applied, the retroactive provisions offend due process and equal protection of the law.

Due Process of Law

Due process of law with regard to federal legislation is guaranteed to U.S. citizens by the fifth amendment to the United States Constitution.¹⁰¹ The retroactive application of the Act violates due process by failing to provide the importer with adequate notice of what acts are prohibited. Adequate notice would give the importer the opportunity to correct his conduct should he wish to avoid the imposition of dumping duties. Such notice would adhere to the concept of "fair warning" which has developed under the due process clause.

Generally, the "fair warning" concept has been applied in the context of void-for-vagueness analysis of criminal statutes.¹⁰² However, the courts have recognized that the principles involved in the concept are equally applicable in civil liability situations.¹⁰³

The concept of "fair warning" is much broader than the constitutional test for vagueness.¹⁰⁴ Even if a statute is clear in defining *what* conduct is prohibited, it is still objectionable under the fair warning standard if an actor cannot know whether this conduct will be within that definition *prior* to undertaking the action.¹⁰⁵

The Antidumping Act is not so indefinite, ambiguous, or unclear that the importer is unaware at the time of importing that his imported merchandise *may* be subject to antidumping duties. This knowledge, however, is of little use to the importer since importing per se is not unlawful. What precipitates dumping liability is the act of importing merchandise at less than its fair value, coupled with injury or likelihood of injury to an industry in the United States. The importer only becomes aware that he is engaging in the activity after a dumping complaint has been filed, the "sales at less than fair value" investigation has been concluded, and notice has been given to him of the withholding of appraisal. Before this notice has been received by the importer, he has not, therefore, been given "fair warning" of the impropriety of his

¹⁰¹ U.S. CONST. amend. V. The fifth amendment provides; "nor shall any person . . . be deprived of life, liberty, or property without due process of law . . ."

¹⁰² See generally W. LAFAYE & A. SCOTT, JR., CRIMINAL LAW 11 (1972).

¹⁰³ See generally 16A C.J.S. *Constitutional Law* § 569(5) nn. 28-29 (1956); C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 7.20 (1969); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-05, (1966); *Bence v. Breier*, 501 F.2d 1185, 1188-90, (7th Cir. 1974), *cert. denied* 419 U.S. 1121 (1974); *Wright v. Arkansas Activities Ass'n*, 501 F.2d 25, 28-29, (8th Cir. 1974).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

conduct. From this point on, however, the importer cannot maintain that he has not had fair warning. Further importations should rightfully be at the importer's own risk.

Furthermore, where the Act has no provision for giving the importer—the person liable for the duties—personal notice of the filing of the dumping complaint, any assessment of dumping duties on purchases made prior to receipt of that notice violates the standards established by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*¹⁰⁶

Equal Protection of the Law

The Act as presently applied by the Department of the Treasury also denies importers the equal protection of the laws. The Supreme Court has protected this right from federal intrusion as part of the due process clause of the fifth amendment to the U.S. Constitution.¹⁰⁷ Equal protection under the fifth amendment prevents unequal treatment of similarly situated persons by the federal government.¹⁰⁸

The Act's denial of equal protection may be best illustrated by a hypothetical situation involving two importers. Let us suppose that Importer A shipped his imports to a port of entry which was reasonably current in its appraisements when an antidumping investigation was begun. The result? Only those imports which were entered after the date of withholding of appraisal notice would remain unappraised on the date of the dumping finding. Thus, all prior imports will escape the application of Section 202(a) of the Act.¹⁰⁹ On the other hand, assume Importer B shipped his merchandise to a port of entry which was delinquent in its appraisements or which had begun a value investigation unbeknownst to the importer. The result? Imports which were entered within 120 days prior to the initiation of an antidumping investigation would be subject to a dumping finding. This administrative interpretation by the Department of the Treasury of section 202(a) of

¹⁰⁶ 339 U.S. 306 (1950). The means employed to notify the interested party must be "reasonably certain to inform those affected." *Id.* at 315. This standard cannot be met without personal notice where, as here, the names and addresses of the affected parties are known by those assessing the dumping duties.

¹⁰⁷ U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* This guarantee of equal protection from *state action* has been read into the due process clause of the fifth amendment, note 108 *infra*, to require equal protection when federal action is involved.

¹⁰⁸ *Buckley v. Valeo*, 424 U.S. 1, 93-98 (1976); *Weinberger v. Weisenfeld*, 420 U.S. 636, 642-53 (1975); *United States v. Yount*, 267 F. 861, 863 (D.Pa. 1920); *Neidd v. District of Columbia*, 110 F.2d 246, 256 (D.C. Cir. 1940).

¹⁰⁹ 19 U.S.C. § 161(a) (1976).

the Act thus results in unequal treatment for persons who are similarly situated. In addition, instead of deterring dumping, the Act as applied promotes "port shopping."

CONCLUSION

The retroactive application of the Act, particularly with regard to the period prior to the date of withholding of appraisement, violates due process and equal protection of the law. In addition, the U.S. practice of retroactive application of its antidumping legislation continues to draw criticism from the world trading community for being inconsistent with the practice of nations. The U.S. position, however, cannot be supported by either superior logic or justifiable need.

As a punitive measure, the retroactive assessment of dumping duties is simply inconsistent with the remedial objective of the Act. In addition, the application of the Act in a retroactive manner is based on unrealistic assumptions, *i.e.*, that the importer is aware of the foreign market value of the merchandise at the time of purchase or exportation, that a dumping investigation once begun will result in a finding of dumping, that the importer will become immediately aware of the initiation of a dumping investigation,¹¹⁰ that the typical importer can negotiate price revisions or discontinue importation instantaneously, that there is a conspiracy between the exporter and the importer, and that the exporter has sworn to a false Special Customs Invoice.

One rationale for the retroactive provisions in the Act is the desire to deter unfair foreign competition. This rationale completely ignores a commonly recognized principle of business tort law that has been frequently applied by courts in the area of economic regulation: a tortfeasor is liable only for the reasonably foreseeable consequences of his acts.¹¹¹ The retroactive application of this Act imposes a strict liability standard in an area where political and economic factors make foreseeability impossible.

In defense of the retroactive provisions, the Treasury Department has maintained that an investigation requires such a great length of time to complete that some form of retroactivity is necessary.¹¹² While this was formerly the case, recent changes in the Customs Regulations

¹¹⁰ It is possible for a district director to liquidate all unappraised importations which entered a port of entry prior to the date of the withholding of appraisement notice and prior to the finding of dumping (see discussion of *Timken Co. v. Simon*, nn.89 and 90 and accompanying text *supra*); however, no law or regulation specifically permits this exercise of authority. To the extent that it is exercised, it cannot be done except in an arbitrary, capricious, and discriminatory manner.

¹¹¹ See generally W. PROSSER, note 74 *supra*.

¹¹² *Report of the U.S. Tariff Commission to the Senate Committee on Finance on S. Con. Res. 38*

have limited the investigation period.¹¹³ Moreover, in the case of egregious dumping, the Department has the power to begin withholding appraisement promptly. As a result, little harm would result if the Act were not applied to those imports which are entered before the withholding of appraisement date.

Perhaps the United States has chosen to ignore the fact that it is one of the most egregious dumpers in the world. In general, prevailing price levels are higher in the United States and other industrialized nations than anywhere else in the world. Thus, sales in foreign markets of products made in the United States at the prevailing price levels within those markets is blatant dumping, whereas sales at U.S. price levels frequently result in charges of economic imperialism.

Part of the difficulty may be attributed to the schizophrenic approach of the U.S. dumping laws. Whereas the focus was once on the unfair competition aspect of dumping, where intent and purpose were determinative,¹¹⁴ the protectionists' focus is presently on a tariff construction where the effect alone is conclusive. If effect is to be the only criterion, unlimited retroactivity could perhaps be argued. This, however, would still violate the fifth amendment.¹¹⁵ On the other hand, if the intent and purposes of the exporter or importer are still relevant considerations, the retroactive application of the Act prior to the withholding of appraisement cannot be justified.

At the very least, the Act should be amended or judicially construed to require that the retroactivity of Section 202(a) be limited to entries which remain unappraised for reasons related to suspected dumping.¹¹⁶ Even better, all retroactivity prior to the withholding of appraisement should be eliminated. This would conform with the requirements of the due process and equal protection clauses because the dumping duty would only be imposed on importations which are entered after the importer has had adequate notice.

It is unfortunate that the greatest interest in the Act is evoked during periods of recession when the Act is employed, not by U.S. businessmen, their lawyers, and U.S. courts to deter truly unfair

in Hearing on International Antidumping Code before the Committee on Finance, United States Senate, note 54 supra.

¹¹³ In 1975 the investigation period was limited to six months, Pub. L. No. 93-618, § 321(a)(2), 88 Stat. 2043 (codified in 19 U.S.C. 160 (b)(1) (1976)). The Customs Regulations reflected this change in 1976, 19 C.F.R. § 153.32 (1979) (first reported in 41 Fed. Reg. 26204, 26209 (1976)).

¹¹⁴ *Cf.* Revenue Act of 1916, 15 U.S.C. § 72 (1976).

¹¹⁵ *See* authority cited in notes 101-09 and accompanying text *supra*.

¹¹⁶ The Customs Service itself appears to recognize that appraisements for value and dumping purposes are unrelated. *United States v. Manahan Chemical Co.*, 24 C.C.P.A. 53, T.D. 48333 (1936); U.S. Customs Service, *Fundamentals of Duty Assessments* 4-135 (August, 1976).

competition, but to create a non-tariff trade barrier. At such times, the political climate makes it unlikely that an amendment to the Act, which would limit the retroactive application of dumping duties, would pass. One must hope for the sake of U.S. importers that a period of economic normalcy is just around the corner which will enable them to obtain the relief they justly deserve.